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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MARSHA ELLIOTT, individually,

Plaintiff,

v.

TARGET CORPORATION, a Minnesota
Corporation d/b/a TARGET; DOES I through X and
ROE CORPORATIONS I through X, inclusive,

Defendants.

CASE NO: 2:11-cv-01215-JCM-RJJ

**DEFENDANT TARGET CORPORATION'S FRCP 35 MOTION FOR PHYSICAL
EXAMINATION OF PLAINTIFF MARSHA ELLIOT ON AN ORDER SHORTENING
TIME**

COMES NOW defendant TARGET CORPORATION, by and through their attorneys
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP. and serve this motion, asking this
Honorable Court to order plaintiff MARSHA ELLIOT to appear for (1) a physical examination by
Dr. Morton Hyson in the above-entitled action.

This motion is made and based on FRCP 35; as well as all papers and pleadings on file herein
and such argument of counsel as the Court may allow at the time of hearing.

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1 DATED this 13th day of April, 2012.

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3 **WILSON, ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP**

4
5 BY: 

6 Kym Samuel Cushing, Esq.

7 Nevada Bar No. 004242

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10 300 South Fourth Street, 11th Floor

11 Las Vegas, Nevada 89101

12 *Attorneys for Defendant Target Corporation*

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22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. FACTUAL SUMMARY**

24 This matter stems from an incident that took place on or about September 28, 2009 at a
25 Target Store in Las Vegas, Nevada. The plaintiff alleges that she arrived at the Target located at
26 3210 N. Tenaya Way, Las Vegas, Nevada, on September 28, 2009. The claimant alleges that she
27 walked to the Home Improvement section of the store to purchase a mop hanger. As she was pulling
28 the hanger off the display, a wire rack, that was for sale, slid off the display and landed on her foot.
She is claiming to have suffered a compression of a nerve in her foot which has resulted in a wage
loss and medical bills.

Specifically, the plaintiff is claiming because of Defendant's negligence, she required
medical treatment and surgery. She further alleges injuries that have resulted in pain, suffering,
impairment, disability in excess of \$50,000.00. Plaintiff is also claiming loss of income and
emotional distress.

II. PROCEDURAL HISTORY

Plaintiff filed her Complaint on April 19, 2011 in the 8th Judicial District Court, Clark
County Nevada. On July 27, 2011, Defendant removed this matter to United States District Court
for the District of Nevada. On August 29, 2011, a Stipulated Discovery Plan and scheduling Order
were filed. The plan was granted on September 2, 2011. On October 24, 2011, Target propounded a
First Set of Interrogatories, a First Request for Production, and a First Request for Admissions on
Plaintiff. Plaintiff did not timely respond to all written discovery, and Defendant filed a Motion to

1 Compel Discovery Response. On February 27, 2012, this court granted Defendant's Motion to
2 Compel and granted sanctions against Plaintiff for late discovery responses.

3 Defendant now brings this motion for physical examination of Plaintiff pursuant to FRCP
4 35, as the physical condition of Plaintiff is in controversy in this matter.

5 **III. LEGAL ANALYSIS**

6 FRCP 35(a) provides in pertinent part as follows:

7 a) ORDER FOR AN EXAMINATION.

8 (1) *In General.* The court where the action is pending may order a party whose mental or
9 physical condition—including blood group—is in controversy to submit to a physical or mental
10 examination by a suitably licensed or certified examiner. The court has the same authority to order
11 a party to produce for examination a person who is in its custody or under its legal control.

12 (2) *Motion and Notice; Contents of the Order.* The order:

13 (A) may be made only on motion for good cause and on notice to all parties and the person to
14 be examined; and

15 (B) must specify the time, place, manner, conditions, and scope of the examination, as well
16 as the person or persons who will perform it.

17 **The physical condition of the plaintiff is in controversy.** Here, Plaintiff is claiming
18 (among other things) as a result of the alleged negligence of Defendant claiming to have suffered a
19 compression of a nerve in her foot which has resulted in a wage loss and medical bills.

20 **Dr. Hyson** will take a complete physical and history from Plaintiff. In addition, Dr. Hyson, a
21 neurologist, will perform a complete physical examination. Time permitting, Dr. Hyson will also
22 perform nerve conduction studies.

23 Therefore, because plaintiff is alleging physical (neurological) impairments, there is good
24 cause for Target Corporation to request that Plaintiff undergo an IME. Further, plaintiff has been
25 provided with sufficient notice of the time, location, manner and scope of said examinations.

26 As a result, request is made that this honorable Court order plaintiff to appear for her
27 scheduled IME on May 1, 2012.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Defendant TARGET CORPORATION requests this honorable
3 Court grant this motion and order plaintiff to appear for his scheduled IME on May 1, 2012.

4 DATED this 13th day of April, 2012.

5 IT IS SO ORDERED.

**WILSON, ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP**

6 .

7 Robert Johnston
8 U.S. Magistrate Judge
9 Date: May 15, 2012

BY: [Signature]
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12 **CERTIFICATE OF SERVICE**

13 Pursuant to FRCP 5(b), I certify that I am an employee of WILSON, ELSER,
14 MOSKOWITZ, EDELMAN & DICKER LLP and that on this 13 day of April, 2012 I
15 electronically filed and served a true and correct copy of the foregoing **DEFENDANT TARGET**
16 **CORPORATION'S FRCP 35 MOTION FOR PHYSICAL EXAMINATION OF PLAINTIFF**
17 **MARSHA ELLIOT ON AN ORDER SHORTENING TIME** to all parties on file with the
18 CM/ECF.

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25 Attorney for Plaintiff

26 BY: [Signature]
27 An Employee of
28 WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP